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No. 991384

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

ANACLEDO B. CASTRO,

Petitioner,

v.

RONALD D. EDWARDS, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the District Court and the Sixth Circuit Court of Appeals apply an inappropriately onerous standard when they denied Petitioner-Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1) and Fed. R. App. P. 22(b)?

2. Did Petitioner fairly present his federal claims to the state courts even though he did not cite federal authorities in the state courts?

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No. _____

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Anacledo B. Castro, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above proceeding on November 16, 1999.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals in, *Castro v. Edwards*, Case No. 97-0439, denying Petitioner's application for a certificate of appealability, is unreported, but is reproduced in the Appendix at A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 16, 1999. This petition is timely filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2253 and Fed. R. App. P. 22, which are set forth verbatim in the Appendix hereto.

STATEMENT OF THE CASE

On August 18, 1994, Anacledo B. Castro was convicted by a jury in Franklin County, Ohio on single counts of voluntary manslaughter and attempted voluntary manslaughter. He was sentenced the same day to a term of twenty-four to forty-six years. Petitioner filed the instant action under 28 U.S.C. § 2254 on April 21, 1997. The petition asserted four grounds for relief: (1) that he was denied due process under the Fourteenth Amendment by the trial court's failure to ensure that he fully comprehended the proceedings in light of his inability to understand English; (2) that he was denied due process under the Fourteenth Amendment through prosecutorial misconduct by the prosecutor's failure to grant immunity to Petitioner's

brother, a co-defendant, to allow him to testify on Petitioner's behalf; (3) that he was denied due process when the prosecution failed to disclose exculpatory evidence; and (4) that he was denied his Sixth Amendment right to the effective assistance of counsel by counsel's failure to object to irrelevant evidence and his failure to object at closing argument and sentencing.

The district court dismissed the petition. It found that Petitioner failed to fairly present the first claim to the state courts and that the claim was procedurally defaulted. The court rejected the second and third claims on their merits. The court found that the fourth claim was procedurally defaulted.

Petitioner filed an application for certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1) and Fed. R. App. P. 22(b) on October 27, 1998. On November 4, 1998, he filed his notice of appeal. The District Court denied the application for certificate of appealability on December 22, 1998. On November 16, 1999, the Sixth Circuit Court of Appeals issued its order denying the certificate of appealability.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The Sixth Circuit Court of Appeals had appellate jurisdiction under 28 U.S.C. §§ 2253 and 1291.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to establish the standard applicable to granting or denying certificates of appealability under 28 U.S.C. § 2253(c). This Court has not resolved the issue whether the standard enunciated in *Barefoot v. Estelle*, 463 U.S. 880 (1983), which governed applications for certificates of probable cause prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), applies to applications for certificates of appealability under 28 U.S.C. § 2253(c), as amended.

The circuits have reached inconsistent results regarding appropriate standards for issuing certificates of appealability. Most circuits have ruled that the standard formerly applicable to certificates of probable cause now govern certificates of appealability. *See*, e.g., *Nelson v. Walker*, 121 F.3d 828, 832 n. 3 (2nd Cir. 1997), *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996), and *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1072 (6th Cir. 1997), *overruled on other grounds by Lindh v. Murphy*, 520 U.S. 320 (1997). However, at least one circuit has applied a "more demanding" standard. *Williams v. Calderon* 83 F.3d 281, 286 (9th Cir. 1996).

Petitioner's first, second, and third claims satisfy the *Barefoot* standard by making a substantial showing of the deprivation of a constitutional right. Petitioner is not required at this juncture to prove the merits of these claims, but only that the issues are debatable among reasonable jurists. *Barefoot*, 463 U.S. at 893 n. 4.[1]

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[1] The first claim, which the District Court denied for failure to fairly present the federal claim in state court, is debatable among reasonable jurists, as demonstrated below. Other circuits would have concluded that the issue was

Moreover, this Court should grant review in order to establish appropriate standards requiring the circuit courts to state reasons when denying applications for certificates of appealability. *See*, e.g., *Herrera v. Payne*, 673 F.2d 307 (10th Cir. 1982), and *Lara v. Nelson*, 449 F.2d 323 (9th Cir. 1971). Absent such a requirement, meaningful appellate review by this Court of the denial of a certificate of appealability is impossible.

Meaningful review by this Court of the denial of Petitioner's application was effectively foreclosed by the Sixth Circuit's disposing of the application without indicating the standard it employed and without stating any reasons or findings. The court simply stated that, "[u]pon review, the court denies the application for a certificate of appealability as to all issues." November 16, 1999 Order. This is insufficient.

Finally, the Court must grant review in order to resolve a conflict among the circuits as to the standards for presentation of the federal issues in state court for exhaustion purposes. Neither the District Court nor the Sixth Circuit reviewed the facts and law presented in the state courts regarding the first

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fairly presented to the state courts. The second and third claims, which the District Court dismissed on the merits, also present substantial constitutional questions. As to the second claim, reasonable jurists could debate the District Court's conclusion that the prosecutor had a legitimate reason for not requesting immunity for Petitioner's brother, a co-defendant. Reasonable jurists could read the record differently, particularly in light of the fact that, two months after Petitioner's conviction, the state dismissed the indictment against Petitioner's brother because "[n]o evidence exists to tie this defendant to the crime." October 27, 1994, Nolle Prosequi. Finally, the third claim presented a substantial showing of a constitutional deprivation. In his application for a certificate of appealability, Petitioner cited portions of the record which contradict the District Court's conclusion that Petitioner failed to provide specific details to establish that the statements of other witnesses besides Ms. Moore may have contained exculpatory evidence. October 27, 1998 Application for a Certificate of Appealability; September 30, 1998 Opinion, 14. Hence, this conclusion is debatable among reasonable jurists.

claim for relief in order to determine whether Petitioner's state law claim "was reasonably understood to raise a . . . federal constitutional issue," regardless of whether the claim explicitly asserted federal legal authority. *Duncan v. Henry*, 513 U.S. 364, 366-67 (1995) (per curiam) (Stephens, J., concurring in judgment, joined by Ginsburg and Breyer, JJ.). This Court and the majority of the circuit courts hold that a claim may, under certain circumstances, be exhausted even though the petitioner did not cite federal law in the state proceedings. *See*, e.g., *Picard v. Connor*, 404 U.S. 270, 278 (1971) (a petitioner can exhaust without "citing 'book and verse on the federal constitution'"); *Henry v. Estelle*, 993 F.2d 1423, 1426 (9th Cir. 1993); *Stewart v. Scully*, 925 F.2d 58, 62 (2nd Cir. 1991); *United States ex rel. Fairman*, 731 F.2d 450, 454 n. 8 (7th Cir. 1984). However, some circuits, including the Sixth Circuit, place an unduly burdensome standard on habeas petitioners to specifically cite federal law. *See*, e.g., *Butler v. Rose*, 686 F.2d 1163, 1168 (6th Cir. 1982) (*en banc*); *Norton v. Parke*, 892 F.2d 476, 480-81 (6th Cir. 1989), *cert. denied*, 494 U.S. 1060 (1990); *Myre v. Iowa*, 53 F.3d 199, 200-01 (8th Cir. 1995); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1126-27 (7th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985). This Court should grant review in order to resolve this conflict.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant the writ and order the Sixth Circuit Court of Appeals to certify the record herein to this Court for review.

Respectfully submitted,

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COUNSEL FOR PETITIONER

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APPENDIX

No. 98-4332

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANACLEDO B. CASTRO,	)	
	)	
Petitioner-Appellant,	)	
	)	ORDER
v.	)	
	)	
RONALD D. EDWARDS, WARDEN,	)	
	)	
Respondent-Appellee.	)	

BEFORE: MARTIN, Chief Judge.

Anacledo B. Castro, an Ohio prisoner proceeding pro se, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The filing of the notice of appeal has been construed as an application for a certificate of appealability. Fed. R. App. P. 22(b).

Upon review, the court denies the application for a certificate of appealability as to all issues.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

No. 98-4332

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANACLEDO B. CASTRO,	)	
	)	
Petitioner-Appellant,	)	
	)	ORDER
v.	)	
	)	
RONALD D. EDWARDS, WARDEN,	)	
	)	
Respondent-Appellee.	)	

BEFORE: MARTIN, Chief Judge.

This court entered an order directing the appellant to show cause why his appeal should not be dismissed on the basis of a late notice of appeal. Also, it noted that the court may lack jurisdiction because the notice of appeal did not designate the court to which the appeal was taken as required by Fed. R. App. P. 3(c). Appellant responded stating that he placed his notice of appeal in the prison mail on October 20, 1998.

A review of the documents before the court indicates that the decision of the district court was entered on September 30, 1998. The notice of appeal filed in the district court on November 4, 1998 was late. *See* Fed. R. App. P. 4(a) and 26(a). However, it should be treated as timely filed on October 20, 1998. *See* Fed. R. App. P. 4(c).

An en banc court recently visited the issue of whether Fed. R. App. P. 3(c) requires a notice of appeal to designate the court to which the appeal is taken. It determined that the failure of a notice of appeal to designate the appeal forum does not require dismissal of the appeal when there is only one possible court to

which the appeal may be taken. *Dillon v. United States*, No. 97-3138, 1999 WL 511697, at *2 (6th Cir. July 21, 1999) (en banc). Appeal No. 99-4332 from the district court's decision could only have been taken to this court.

Accordingly, the show cause order is withdrawn.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

United States Code Annotated (West 1999).

FED. R. APP. P. 22

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renew of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

United States Code Annotated (West 1999).